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No. 83-1604

In the Supreme Court of the United States

October Term, 1983

FRANKLIN STONE PRODUCTS, INC.

Petitioner,

v.

J. DALE DAWSON, MARGARET OSMUNDSEN, ELMER F. GERAGHTY, CLAIRE C. GERAGHTY, and EVALYN LEONARD,

Respondents.

On Petition for a Writ of Certiorari
To the Supreme Court of Wisconsin

BRIEF IN OPPOSITION AND APPENDIX

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HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

QUESTION PRESENTED

Under the facts of this case, does the voluntary dismissal of an appeal by a corporation through its court appointed receiver pursuant to Wisconsin Statutes, violate the due process clause of the 14th Amendment to the Federal Constitution?

LIST OF PARTIES

While not named as a party by Attorney Schulz, who alleges he is acting on behalf of corporation Franklin Stone Products, Inc., it appears to Receiver Theodore J. Hodan that in this action Receiver Hodan should have been designated as a Respondent. However, rather than attempt to amend or change the caption, Receiver Hodan will respond to this brief as if he were a named Respondent.

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No. 83-1604

In the Supreme Court of the United States

October Term, 1983

FRANKLIN STONE PRODUCTS, INC.
Petitioner,

v.

J. DALE DAWSON, MARGARET OSMUNDSEN, ELMER F. GERAGHTY, CLAIRE C. GERAGHTY, and EVALYN LEONARD,
Respondents.

On Petition for a Writ of Certiorari
To the Supreme Court of Wisconsin

BRIEF IN OPPOSITION TO PETITION

Theodore J. Hodan, as duly appointed receiver of Franklin Stone Products, Inc. requests this Court deny the petition for a writ of certiorari which Petitioner has denominated as seeking review of a decision and order of the "Wisconsin Court of Appeals, District I," but which the receiver believes is correctly a petition to review an order of the Supreme Court of the State of Wisconsin.

STATEMENT OF THE CASE

Almost all of the factual "statements" in Petitioner's "Statement of the Case" are absent from the record presented to this Court. In fact, such claimed facts are not contained in any of the factual findings of the trial court, nor are they supported for the most part by any of the trial or appellate court records. Much of this information is erroneous at best, and misleading at worst. Since it is unsupported in the record it will not be dignified by further comment in this response.

This petition is one of over twelve (12) appellate court proceedings commenced by Elmer F. Geraghty and Claire C. Geraghty through Attorney Leonard Schulz and other attorneys, attempting to vacate a settlement agreement made in open court in the Circuit Court of Milwaukee County, the Honorable Patrick J. Madden, circuit judge presiding, on January 10, 1983 (Res. App. A, p. A-1). This settlement agreement resolved all of the causes of action among the parties alleged in various complaints and counterclaims.

The formal order incorporating this settlement agreement was entered by the Court on January 17, 1983 (Res. App. B, p. A-10).

After the settlement agreement was entered of record, the Geraghtys apparently had a change of heart with regard thereto and through new counsel filed a motion to vacate the agreement. A hearing on such request occurred in the trial court on March 2, 1983, during which time all of the parties including the corporation, Franklin Stone Products, Inc., were represented by separate counsel. Following the hearing, the trial court denied various motions including the request to vacate and withdraw the settlement agreement placed of record Jan-

uary 10, 1983. This hearing included the sworn testimony of Claire C. Geraghty, and was formalized by written order entered March 8, 1983 (Res. App. C, p. A-13).

Because of the refusal by parties Elmer F. Geraghty and Claire C. Geraghty to comply with the provisions of the settlement agreement and the court orders incident to implementation of such agreement, on March 30, 1983 the trial court appointed Attorney Theodore J. Hodan as receiver of Franklin Stone Products, Inc. pursuant to Wis. Stats. §180.773 (Res. App. D, p. A-17). Among the powers given the receiver by the Court in the appointing order were authorization that the "receiver shall act on behalf of the corporation in all pending and future legal actions in which Franklin Stone Products, Inc. is a party, and, as an attorney at law, shall represent said corporation in all such actions, including this action" (Res. App. D, p. A-17).

Following his appointment as receiver, and pursuant to specific authorization in the appointing order, Receiver Theodore J. Hodan, by letter dated March 31, 1983, discharged Attorney Leonard Schulz as counsel for Franklin Stone Products, Inc., and instructed him to perform no further legal work of any kind on behalf of such corporation (Pet. App. E, p. A-22). Thereafter, because Attorney Schulz nevertheless continued to act as if he still represented Franklin Stone Products, Inc., on June 17, 1983 Receiver Theodore J. Hodan filed a notice of voluntary dismissal of the appeals previously filed by Schulz of the trial court's various orders, including its order denying vacation of the settlement stipulation (Pet. App. E-1). Because of objection to this dismissal notice by Attorney Schulz, purportedly acting on behalf of the corporation, the Wisconsin Court of Appeals, District I,

by order dated September 13, 1983, requested Schulz and Hodan to file written memoranda addressing such question. Appellate proceedings were stayed pending disposition of this issue (Pet. App. C, p. A-14, 15). Following consideration of such memoranda, the Wisconsin Court of Appeals by order dated November 3, 1983 granted the receiver's voluntary dismissal request and ordered that the appeals filed by Attorney Schulz be dismissed (Pet. App. D, p. A-17). Review of such decision was sought in the Supreme Court of the State of Wisconsin and denied by order dated January 10, 1984 (Pet. App. A, p. A-1).

REASONS FOR DENYING WRIT

I. ATTORNEY SCHULZ HAS FAILED TO ESTABLISH AUTHORITY TO ACT ON BEHALF OF THE CORPORATION IN THIS CASE

In its November 7, 1983 opinion, the Wisconsin Court of Appeals stated:

> "Schulz contends that, as counsel for the corporation, he has the authority to challenge the appointment of the receiver. He argues that the corporation 'has fundamental right to prosecute this appeal using counsel of its own selection.' The corporation, however, does not have a mind or will of its own. The business and affairs of a corporation are managed by its board of directors. Sec. 180.30, Stats. The board of directors have the authority to retain counsel to challenge the appointment of the receiver, but Schulz does not allege that he has been retained in that capacity. Furthermore, it appears that the directors have retained Attorney Eugene Kershek in that capacity. In the absence of action by the board of directors, stockholders could maintain a derivative action pursuant to sec. 180.405, Stats., if

> they opposed the appointment of receiver. Schulz does not allege that he has been retained by stockholders in that capacity. Schulz has not shown that, as counsel for the corporation, prior to the appointment of the receiver, he has any authority to maintain the appeals." (Pet. App. B-2).

Although in his petition with this court Attorney Schulz, purportedly acting on behalf of the corporation, accuses the Wisconsin Court of Appeals of raising an issue not previously presented, that is, the question of whether he, as counsel for the corporation, had any authority to maintain the appeals, the fact is that the Court of Appeals in its order of September 13, 1983 specifically directed him to file a memorandum on this question. Clearly the Court's opinion of November 7, 1983 found that he had not established that he had the authority to prosecute the appeals. Nothing submitted to this Court establishes such authority.

While the corporation's voluntary dismissal of the appeal eliminated it as a party, all of the shareholders and directors of the corporation remain involved in the appeal as either appellants or respondents. The appeals filed by parties Elmer F. Geraghty, Claire C. Geraghty and Evalyn Leonard are identical in form to the appeals filed by the corporation through Attorney Schulz (Res. App. E, p. A-22; F, p. A-28). These appeals are incorporated into and a part of Wisconsin Court of Appeals Case 83-567 and are presently pending in the Wisconsin Court of Appeals. Again, it must be stressed that all of the shareholders and directors are represented by counsel in the Wisconsin Appellate Court. Leonard Schulz was found by the Court of Appeals to be without authority to maintain the appeals. If he had no authority to maintain the appeals in the Wisconsin Court of Appeals or

the Wisconsin Supreme Court, he had no authority to file this petition.

II. THE CORPORATION HAS NO STANDING TO FILE THIS PETITION

Complaints by shareholders in stockholder suits of the kind at bar are not really actions brought by individuals, but individuals in their representative capacity on behalf of the corporation. When such suits allege mismanagement, they ask the Court to protect the corporation from its officers and directors. As a result, though nominally a defendant, the corporation as the real party in interest cannot appeal the appointment of a receiver.

In *Provident Investment Corporation v. Dibrell,* Tex. Civ. App., 320 S.W.2d 415, 418 (1959), the following was stated:

> "In a case of this nature the plaintiff stockholders do not sue on a cause of action belonging to them as individuals. They sue in a representative capacity on a derivative cause of action. The cause of action belongs to the corporation. [Citations omitted] The real party at interest is the corporation though it may be formally aligned as a defendant. It is a necessary party to the suit so that it will be bound by the judgment so that it may not later subject the defendants to a second suit. [Citations omitted] The reason it appears formally as a defendant is because it is under the control of persons charged with the wrongs complained of in the suit and refuses to act. This gives the shareholders the right to act for its benefit.
>
> "Dean Hildebrand, in his work Texas Corporations, Vol. 3, Sec. 773, at page 221, says: 'It (the corporation) is a necessary party defendant * * * although, in truth, the plaintiff.' Again in Section 775, at pages

> 225-226, the same author says: 'In fact while the corporation is on the record a defendant, in substance the corporation is actually the plaintiff.'
>
> "Realistically the controversy is between the corporation and the fraudulently acting officers and directors. It is really the complainant in the suit. [Citations omitted]
>
> "The receiver when appointed in the case was appointed in response to the request of those acting for it. Too, a trial judge who has heard the evidence has determined on a basis of the evidence that the corporation is helpless to act because of the wrongful acts of its officers, directors and controlling stockholders. The receiver was appointed to protect the corporation. The judgment is in its favor, not adverse to it. A party on appeal cannot complain of action by the court that is favorable to it."

This same analysis applies to the filing of the petition herein.

III. NO SUBSTANTIAL FEDERAL QUESTION HAS BEEN SHOWN

Allegations of violations of due process are easily made. Allegations alone, however, do not equal facts. Even assuming that the corporation on its own has a right to appeal the various actions of the trial court, and assuming further that Attorney Schulz can show, which he has not, that he acts as counsel for such corporation in such appeals, it is submitted the actions of the trial court, the Wisconsin Court of Appeals and the Wisconsin Supreme Court in refusing to permit Schulz to act as counsel for the corporation in challenging such actions, do not constitute a substantial federal question essential to the jurisdiction of this court. Franklin Stone Products, Inc., purported acting through Attorney Schulz, cites *no*

case from this court or from any court which holds that what has occurred at bar constitutes deprivation of federal due process rights. Abstract constitutional claims and theories do not magically elevate themselves to substantial federal questions.

Even with the assumptions set forth above, this case presents no substantial federal question. Majority shareholders Geraghty have filed and are pursuing the identical appeals which are sought to be duplicated by Attorney Schulz on behalf of the corporation. Minority shareholders are respondents in such appeals. No shareholder or member of the board of directors is unrepresented. No additional issues are sought to be raised by Attorney Schulz in addition to those already raised and now under consideration in the Wisconsin Court of Appeals. Therefore, no substantial federal question is presented by this petition. *Parker v. McLain,* 237 U.S. 469, 59 L.Ed. 1051, 35 S.Ct. 632 (1915); *Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co.,* 252 U.S. 388, 64 L.Ed. 626, 40 S.Ct. 404 (1920); *Zucht v. King,* 260 U.S. 174, 67 L.Ed. 194, 43 S.Ct. 24 (1922); *New Orleans Waterworks Co. v. Louisiana,* 185 U.S. 336, 46 L.Ed. 936, 22 S.Ct. 691 (1902).

CONCLUSION

Petitioner, claiming to act through its counsel Attorney Leonard Schulz, asks this court to find federal due process violations. The Wisconsin Court of Appeals found that Counsel Schulz had failed to establish he had the authority to act as attorney on behalf of the corporation. Nothing presented to this Court establishes the contrary.

In addition, based on the record presented in support of this petition, no substantial federal question is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF WISCONSIN : CIRCUIT COURT
MILWAUKEE COUNTY : BRANCH #31

J. DALE DAWSON and
MARGARET OSMUNDSEN,

Plaintiffs,

Case No. 561-943

—vs—

FRANKLIN STONE PRODUCTS, INC.,
Defendant,

—and—

ELMER F. GERAGHTY, CLAIRE C.
GERAGHTY and EVELYN LEONARD,

Defendants and
Third-Party Plaintiffs,

—vs—

LANNON STONE PRODUCTS, INC.
and RITA KLUTH,

Third-Party Defendants.

The above-entitled matter coming on to be heard before the Honorable Patrick J. Madden, judge of the above-named court, on the 10th day of January, 1983, in the Courthouse in the City of Milwaukee, Milwaukee County, State of Wisconsin.

APPEARANCES

NIEBLER & NIEBLER by JOHN E. NIEBLER, ESQ., appeared on behalf of the plaintiffs and third-party defendant Lannon Stone Products Corporation.

RIORDAN, CRIVELLO, CARLSON, MENTKOWSKI & HENDERSON by DONALD H. CARLSON, ESQ., appeared on behalf of defendant Franklin Stone Products, Inc.

QUARLES & BRADY by FRANK J. DAILY, ESQ., appeared on behalf of defendants and third-party plaintiffs Elmer F. Geraghty, Claire C. Geraghty and Evelyn Leonard.

HUNTER & SOMMERS by JAMES R. SOMMERS, ESQ., appeared on behalf of third-party defendant Rita Kluth.

* * *

TRANSCRIPT OF PROCEEDINGS

THE COURT: Case of J. Dale Dawson, et al. vs. Franklin Stone Products, Inc., et al., Case No. 561-943. May I have the appearances, please.

MR. NIEBLER: For the plaintiffs, John Niebler of Niebler & Niebler.

MR. SOMMERS: Third-party defendant Rita Kluth appears by Hunter & Sommers by James R. Sommers.

MR. DAILY: The defendants and third-party plaintiffs Elmer F. Geraghty, Claire C. Geraghty and Evelyn Leonard appear by Attorney Frank J. Daily.

MR. CARLSON: The defendant Franklin Stone Products, Inc. by Attorney Don Carlson.

THE COURT: I note Mr. and Mrs. Geraghty are here personally. Can you hear everything that's going on? If not, you're welcome to come up closer to the action. It's up to you entirely.

Very well. Let the record show there's been a relatively short, informal conference in chambers concerning procedures, and with that it's my understanding further that there has been some kind of an arrangement made which should be put on the record. Who'd like to make that record and let us know what it involves?

MR. DAILY: I'll be happy to, Your Honor.

THE COURT: Mr. Daily.

MR. DAILY: And I'd simply invite other counsel to supplement it as may be necessary for the completeness of the record.

As we advised the Court, Your Honor, we have received on behalf of the stockholders of Franklin Stone Products, Inc. and, of course, the corporation itself an offer to purchase certain but not all of the assets of that corporation comprised primarily of the real estate fixtures and equipmemnt as well as inventory relating to a stone quarry operated by that corporation at 7220 South 68th Street in Franklin. The terms of that offer have been made available to Mr. Niebler, who represents the interests of two minority shareholders. Mr. Carlson and I have had an opportunity to review that offer and the various terms and conditions of the offer with Mr. and Mrs. Geraghty, the majority shareholders of the corporation. We have also advised the Court that we have negotiated with the prospective purchaser, the Vulcan Materials Company, an understanding, agreement that their offer will remain open for a period of 30 days, with-

in which time, I have advised Mr. and Mrs. Geraghty, that they are free, as is Mr. Niebler and his clients, to seek a better offer, higher offer, higher cash offer from another bonafide purchaser for at least a review and consideration of the shareholders. And in view of that present posture of the matter, we've advised the Court a trial which was set to begin a week from today should be removed or taken off the calendar and that we are able now to dismiss the claims, cross claims and allegations that relate to the underlying lawsuit in terms of various allegations and cross allegations of mismanagement and fraud and other matters relating to the operation of the business filed by Franklin Stone Products. It was further agreed that the proceeds from the sale, the contemplated sale of the business will be deposited in an interest-bearing account until such time as all the closing details have been resolved and the money then distributed to the shareholders in accordance with the percentages of their ownership in the business. We also advise the Court there are certain other assets owned by the corporation which are basically comprised of various vacant pieces of real estate in a number of different counties. Those are not included in the prospective sale to Vulcan, but will be distributed either in kind or in some formula that's agreeable to the shareholders and their respective counsel following or as part of the sale to Vulcan, but they are not tied to the sales transactions I've had reference to with Your Honor. Given all of those facts and details, it's my recommendation to my clients and representation to the Court that I believe it is in the best interests that the lawsuits and cross claims in fact be dismissed and that the shareholders and the companies now pursue an opportunity to see if they can better the present offer, and failing that, to accept this offer and proceed

in an orderly fashion to distribute the sale proceeds and to dissolve the corporation in accordance with regular corporate procedures in a way that will be to their best advantage from a tax standpoint.

THE COURT: I don't want to misstate anything, but as I understand it, basically the agreement is that if this property is sold, that sale is agreeable to all of the parties, then the action for dissolution will go out of the court and be taken care of in the normal manner.

MR. DAILY: That's correct, Your Honor, that's my understanding.

THE COURT: Mr. Niebler.

MR. NIEBLER: May it please the Court, I concur in the statement and stipulation made by Mr. Daily. I would simply like to add several additional items at least for completeness sake, one of which is counsel have agreed that neither the parties nor counsel will disclose the amount of the offer to other prospective purchasers during this 30-day period of time. Secondly, we understand that as part of the stipulation the Court will retain jurisdiction although the case on the merits, the allegations of the complaint, counterclaim, third-party complaints and so on will be dismissed on their merits today. We understand the Court will retain jurisdiction under chapter 180 of the Wisconsin Statutes until the corporation is indeed dissolved and the assets are distributed in accordance with the proportion of ownership of the shareholders, and, also, that the stipulation herein and mutual releases will be drafted and entered into by the parties and counsel. Is that correct, Mr. Daily?

MR. DAILY: That's Correct.

THE COURT: Now, the 30-day period is to commence today or the time —

MR. DAILY: I think it's fine to have it commence today, Judge.

THE COURT: Today. Now, I see Mr. Geraghty is shaking his head up and down in affirmation. Do you have any questions about what you've heard, Mr. Geraghty?

MR. GERAGHTY: It sounds pretty good.

THE COURT: Anything you don't understand about it?

MR. GERAGHTY: No. I understand it all.

THE COURT: How about you, Mrs. Geraghty?

MRS. GERAGHTY: As much as I heard I believe I understood.

THE COURT: Did you hear everything that was said?

MRS. GERAGHTY: Yeah.

THE COURT: You did.

MRS. GERAGHTY: Um-hum.

THE COURT: I think what has been said is quite clear. There's one thing that I think perhaps should be emphasized again, that apparently there is a cash offer, an amount unknown, and it will remain unknown, I would suspect, until these matters are all taken care of, secondly, that a better offer, if there is such a better offer obtained, would also have to be a cash offer rather than some type of financing agreement which has become popular these days. Do you understand that?

MRS. GERAGHTY: Right.

THE COURT: Mr. Geraghty?

MR. GERAGHTY: Yes, Well, if — I would take — you know, as long as Dawsons got their share out of it for taxes, I wouldn't have to have mine right away.

THE COURT: Well, actually, the disposition of the amount received as a result of this cash offer or a better cash offer would be put into a trust account to await the dissolution of the corporation in the normal manner, which would include all other assets.

MR. GERAGHTY: O.K.

THE COURT: If I'm misstating anything, gentlemen, tell me.

MR. DAILY: No, I think that's correct, Your Honor. I think the thrust, as the Court properly indicated in chambers, the record should reflect, that in this time of uncertainty and financial hard times an offer in cash right now is worth substantially more than any offer which would have contingencies in it, the kind of financing which might pay out over a period of time. I've advised Mr. and Mrs. Geraghty that the fact we do have an offer which is payable in cash right now, within 30 days, whatever, is a very substantial offer and is worth much more than an offer which purports to be paid over a period of ten years secured by some unknown asset. You understand what the Judge said, some other offer would have to be cash now so you'd have the money right away.

THE COURT: Or the corporation would have the money right away so you could proceed to dissolve the corporation.

Now, how about the third-party defendant. That is included as part of the whole packet.

MR. SOMMERS: I assume there will be dismissal on the merits today and we'll agree to exchange general releases.

MR. DAILY: Yes.

THE COURT: Very well. Based upon the stipulation which has been entered on the record, the action will be dismissed by the Court by agreement of the parties with the Court retaining jurisdiction until such time as the corporation is dissolved. In other words, that's part of the whole stipulation.

Now, I'm going to ask you a question. I don't have the pleadings in front of me — they're in front of me, but I haven't studied them in detail for a period of time. This will not interfere with the salability of the property, the fact the Court by agreement is retaining jurisdiction over the dissolution of the corporation possibly, would it?

MR. NIEBLER: No, we don't believe so, Your Honor. We believe the parties have an obligation to work in good faith to achieve the agreement that we reached here in court today.

THE COURT: The Court has made its order, but do you think it would help to reduce it to writing?

MR. DAILY: Yes, I think it would, Judge, and we'll be happy to prepare one so there's something of record.

THE COURT: It will be, when signed by the Court, nunc pro tunc.

MR. DAILY: Fine.

THE COURT: Do it under the five-day rule. Put right down at the bottom nunc pro tunc as of January 10, 1983.

MR. DAILY: That's fine.

THE COURT: I think this action appears to be in the best interests of all involved and commend you for the work you've done on it, gentlemen.

MR. NIEBLER: Thank you, Your Honor.

MR. DAILY: Thank you, Your Honor.

* * *

STATE OF WISCONSIN)
) S.S.
MILWAUKEE COUNTY)

I, Marilyn Williquette, Official Reporter, do hereby certify that I reported the foregoing proceedings, that the same is true and correct as reflected by my original machine shorthand notes taken at said time and place before the Honorable Patrick J. Madden, Circuit Judge, presiding.

Dated at Milwaukee, Wisconsin this 1st day of February, 1983.

/s/ Marilyn Williquette
Registered Professional Reporter

APPENDIX B

STATE OF WISCONSIN

CIRCUIT COURT MILWAUKEE COUNTY

J. DALE DAWSON and
MARGARET OSMUNDSEN,
Plaintiffs

vs.

ELMER F. GERAGHTY, CLAIRE C. GERAGHTY and EVELYN LEONARD,
Defendants

ORDER
Case No. 561-943

and

FRANKLIN STONE PRODUCTS, INC.,
Defendant and
Third-Party Plaintiff

vs.

LANNON STONE PRODUCTS CORP. and
RITA KLUTH,
Third-Party Defendants.

Upon the stipulation made in open Court before the Honorable Patrick J. Madden, Circuit Judge, on January 10, 1983, with John H. Niebler appearing for the plaintiffs and third-party defendant, Lannon Stone Products Corp.; Donald H. Carlson appearing for defendant and third-party plaintiff, Franklin Stone Products, Inc.; Frank J. Daily appearing for defendants, Elmer F.

Geraghty, Claire C. Geraghty and Evelyn Leonard; and James R. Sommers appearing for third-party defendant, Rita Kluth,

IT IS ORDERED:

1. That all of the claims and causes of action alleged in the Complaint, Counterclaims, Third-Party Complaint and other pleadings in this case are hereby dismissed on their merits without costs to any party.

2. Specifically, the Third-Party Complaint is dismissed on its merits without costs to any party and the third-party defendants, Lannon Stone Products Corp. and Rita Kluth, are dismissed from this action.

3. The trial scheduled to begin January 17, 1983, is removed from the Court's trial calendar.

4. The Court will retain jurisdiction over this case and the plaintiff and defendants for the purpose of the dissolution of the corporation, Franklin Stone Products, Inc., under Sections 180.771 through 180.787 of the Wisconsin Statutes, with the sale of assets and dissolution of the corporation to be conducted as follows:

a. Franklin Stone Products, Inc. has received an offer for the sale of a substantial portion of its assets from Vulcan Materials Company dated January 7, 1983. The offer will remain pending for a period of thirty (30) days from January 10, 1983, during which time any of the parties, or their counsel, shall be free to solicit a better cash offer from any prospective purchaser. If a better cash offer is received within said thirty (30) days, it shall be accepted by all the parties. If a better cash offer is not received, all the parties agree that the offer from Vulcan Materials Company will be accepted and that Franklin Stone Products, Inc. will sell the assets described in said

offer to Vulcan Materials Company in accordance with the terms of the offer, with all stockholders of Franklin Stone Products, Inc., voting for such sale.

b. The cash proceeds from the sale of the assets will be deposited in an interest bearing account controlled by counsel to be used for the payment of obligations of the corporation and distribution to the stockholders in accordance with the corporate dissolution procedure under Chapter 180 of the Wisconsin Statutes, and in proportion to shares of stock held by the stockholders.

c. Assets of the corporation not sold in accordance with subparagraphs a and b above will be distributed in kind to the stockholders according to a formula to be agreed to by counsel.

4. Mutual general releases shall be signed by the parties releasing each other from all tort and contractual claims arising under the pleadings in this lawsuit.

This Order is made effective *nunc pro tunc* as of January 10, 1983.

BY THE COURT:

/s/ Patrick J. Madden

Patrick J. Madden,
Circuit Judge

APPENDIX C

STATE OF WISCONSIN

CIRCUIT COURT MILWAUKEE COUNTY

J. DALE DAWSON and
MARGARET OSMUNDSEN,
Plaintiffs

vs.

ORDER
Case No. 561-943

FRANKLIN STONE PRODUCTS, INC.,
ELMER F. GERAGHTY, CLAIRE C.
GERAGHTY and EVELYN LEONARD,
Defendants.

The above-entitled action having come before the Circuit Court for Milwaukee County, the Honorable Patrick J. Madden, Circuit Judge, presiding on March 2, 1983, for the Court to hear and decide various Motions filed by the parties and certain counsel herein, with John H. Niebler appearing for the plaintiffs, with Frisch, Dudek and Slattery, Ltd., by John G. Gehringer, appearing for defendants, Elmer F. Geraghty, Claire C. Geraghty and Evelyn Leonard, and Riordan, Crivello, Carlson, Mentkowski & Henderson, by Frank L. Steeves, appearing for the defendant, Franklin Stone Products, Inc., and with defendants, Elmer F. Geraghty and Claire C. Geraghty, appearing in person and as officers of defendant, Franklin Stone Products, Inc.; and the Court having conducted an extensive hearing in chambers and in open Court upon the various Motions and the Court having granted the

request of Elmer F. Geraghty and Claire C. Geraghty to allow the firm of Frisch, Dudek and Slattery, Ltd. to withdraw as their counsel, and to permit the law firm of Riordan, Crivello, Carlson, Mentkowski & Henderson to withdraw as counsel for defendant, Franklin Stone Products, Inc.; and Eugene A. Kershek having appeared in the action on behalf of defendants, Elmer F. Geraghty, Claire C. Geraghty and Evelyn Leonard, and, during the hearing in open Court Attorney Leonard W. Schulz having appeared on behalf of defendant, Franklin Stone Products, Inc., and the Court having considered the arguments of counsel and the testimony of witnesses, as well as Motion papers filed with the Court; and the Court having decided the Motions and stated his decision orally from the bench;

Now, upon the Court's decision announced in open Court on March 2, 1983, and upon Motion of John H. Niebler, attorney for the plaintiffs,

IT IS ORDERED:

1. The defendants' Motion to Modify Order dated February 9, 1983, is withdrawn at the request of the defendants.

2. The defendants' Motion to set aside the Stipulation and Order dated January 10, 1983, and the written Order entered January 17, 1983, is denied.

3. The plaintiffs' Motion to Enforce Order is granted and the Order of this Court made effective nunc pro tunc as of Januaray 10, 1983, is modified as follows:

a. The assets of Franklin Stone Products, Inc. which were the subject of an Offer to Purchase from Vulcan Materials Company dated January 7, 1983, shall be sold to the highest cash bidder with the time for submitting bids extended to

9:00 a.m. on March 30, 1983. A copy of the bid form to be submitted to the Court is attached hereto marked Exhibit A.

b. Before March 30, 1983, any party to this action, and particularly Franklin Stone Products, Inc., may advertise for bids or otherwise solicit prospective purchasers who may submit sealed, written bids for the cash purchase of said assets. Such bids shall be submitted to this Court no later than 9:00 a.m. on Wednesday, March 30, 1983, at which time the Court shall open the bids and direct the sale to the highest bidder. All such bids shall be accompanied by a bank letter of credit or cashier's check in the full amount of the bid price; no bid less than $1,750,000.00 will be accepted.

c. Franklin Stone Products, Inc. and its officers and directors shall cooperate to effect the acceptance of the highest bid and the conveyance of the property to the highest bidder by signing the required Deed, Bill of Sale, Transfer Tax Return, Assignment of Folack Lease, Corporate Resolutions and other documents necessary to effect the transfer. In the event of any failure or refusal to immediately execute such documents, the Court shall appoint _____

_____

as receiver for the corporation for the purpose of effecting the sale and liquidating the other assets of the corporation and completing the dissolution of the corporation under Sec. 180.773 of the Wisconsin Statutes.

4. The sale of the quarry assets under Paragraph 3 above shall be closed on March 30, 1983, immediately after the opening of the bids, and all proceeds therefrom shall be deposited with the Court. Thereupon the officers of the corporation, Franklin Stone Products, Inc., or the

receiver, shall proceed to liquidate the assets of the corporation, pay creditors, account for corporate financial transactions and distribute assets to the shareholders in proportion to their holdings, all in accordance with the Wisconsin Statutes. Assets of the corporation not sold for cash, in accordance with Paragraph 3 above, shall be distributed in kind to the stockholders according to a formula agreed to by counsel for the shareholders or by the Court if no agreement is reached.

5. Until dissolution of the corporation is completed, the Officers of Franklin Stone Products, Inc. shall be subject to the restrictions of the previous Orders of this Court.

Signed at Milwaukee, Wisconsin this 8th day of March, 1983.

/s/ Patrick J. Madden

Patrick J. Madden,
Circuit Judge

APPENDIX D

STATE OF WISCONSIN
CIRCUIT COURT MILWAUKEE COUNTY

J. DALE DAWSON and
MARGARET OSMUNDSEN,
Plaintiffs

vs.

ORDER APPOINTING
RECEIVER

Case No. 561-943

FRANKLIN STONE PRODUCTS, INC.,
ELMER F. GERAGHTY, CLAIRE C.
GERAGHTY and EVELYN LEONARD,
Defendants

Under the Order of the Court dated January 10, 1983, and the stipulation of the parties on January 10, 1983, the Court having retained jurisdiction for the purpose of the dissolution of the defendant corporation, Franklin Stone Products, Inc., under Sections 180.771 through 180.787 of the Wisconsin Statutes, and the Court having considered the appointment of a receiver to complete the sale of the quarry assets to the highest bidder according to the Order of the Court dated March 8, 1983, and after several hearings in open court after the plaintiffs' request for the appointment of a receiver under Section 180.773, and upon the Court's decision made at the hearing in open court on March 21, 1983, that the purposes of the settlement of this lawsuit and dissolution of the corporation can only be accomplished through the appointment of a receiver,

IT IS ORDERED, as follows:

1. That Theodore J. Hodan, an attorney practicing before this Court, whose offices are located at 5960 W. Brown Deer Road, Milwaukee, Wisconsin 53223, is hereby appointed receiver of the defendant, Franklin Stone Products, Inc., for the purpose of the sale of the assets of said corporation and the liquidation of the corporation pursuant to Section 180.773 of the Wisconsin Statutes.

2. Said receiver shall have full power and authority to convey all of the real and personal property of said corporation to the highest bidder in accordance with the Order of this Court dated March 8, 1983. Such conveyance and sale shall take place immediately after opening the bids in this Court on March 30, 1983. The receiver shall execute the documents necessary to convey the property in accordance with the Bid Form to the highest bidder and shall accept the proceeds from the sale. Said proceeds shall be immediately deposited in an interest bearing checking account the receiver shall establish at the M & I Silver Spring Bank. From the proceeds of the sale the receiver shall make an immediate interim distribution of $600,000.00 to Elmer F. Geraghty and Claire C. Geraghty and $400,000.00 to Niebler & Niebler, as attorney for J. Dale Dawson and Margaret Osmundsen. The balance of said funds shall be used for the payment of the obligations of the corporation and distribution to the shareholders in accordance with the statutes.

3. The officers of the corporation, namely Elmer F. Geraghty and Claire C. Geraghty, shall deliver to the receiver the keys to all corporate offices and the combination to the corporation's safe, and shall make available immediately to the receiver the current corporate

business records and financial records, including the corporate checkbook and records of sales, payables, receivables and other obligations of the corporation, as well as all records and title documents relating to corporate assets.

4. The receiver shall have full power and authority to sell, convey and dispose of all or any part of the assets of the corporation, wherever situated, either at public or private sale, or to distribute the same in kind to shareholders as part of the shareholders distribution at a value to be determined by the receiver after fair investigation.

5. The receiver shall have full power and authority to collect any obligation owing to the corporation, by suit at law, if necessary, and to compromise or settle any claim for or against the corporation. The receiver shall act on behalf of the corporation in all pending and future legal actions in which Franklin Stone Products, Inc. is a party, and, as an attorney at law, shall represent said corporation in all such actions, including this action.

6. The receiver shall have authority to pay all of the obligations of the corporation and shall have the right to compromise or settle any claims against the corporation from the assets of the corporation. Such assets shall be applied to the expenses of the liquidation and to the payment of liabilities and obligations of the corporation before final distribution to the shareholders. However, when the receiver determines that the assets available exceed the liabilities, the receiver may make additional interim distributions to the shareholders. The fees, costs and expenses of the receiver shall be paid out of the corporate assets as expenses of the liquidation.

7. The receiver shall have the power and authority to engage the services of accountants or other professionals needed to conclude the affairs of the corporation. The receiver shall make an accounting to be filed with the Court as to the assets, liabilities and obligations of the corporation and shall otherwise account to the Court for the financial condition of the corporation before and after the appointment of the receiver.

8. The receiver shall have full power and authority to prepare, execute and file all documents and instruments on behalf of the corporation, including all documents for the sale and conveyance of corporate assets and all official documents to be filed with state, federal and local authorities, including all tax returns on behalf of the corporation. In all other respects, the receiver shall have the authority and power to liquidate the corporation and wind up its affairs as provided in Sections 180.771 through 180.787 of the Wisconsin Statutes, without specific application to the Court for the particular acts required to accomplish said liquidation.

9. That the receiver shall give the usual bond of the receiver in the amount of $2,000,000.00 to the clerk of this Court with at least one good and sufficient surety to be approved by the Court, conditioned for the faithful discharge of his duties as such receiver, and that he duly account for whatever shall come into his hands or control as such receiver, and pay and apply the same from time to time as authorized by this Order or as further directed by the Court. The amount of such bond may be increased or decreased by further Order of the Court.

10. That upon the filing of the bond, the receiver shall enter upon his duties as such, take possession of the stock, assets, property, books, papers, accounts and all other things belonging to said corporation, Franklin Stone Products, Inc., and sell or distribute the same in accordance with this Order and the further Orders of this Court.

Signed at Milwaukee, Wisconsin this 30 day of March, 1983.

BY THE COURT:

/s/ Patrick J. Madden

Patrick J. Madden
Circuit Judge

APPENDIX E

STATE OF WISCONSIN
CIRCUIT COURT MILWAUKEE COUNTY

J. DALE DAWSON and
MARGARET OSMUNDSEN,
Plaintiffs,

vs.

NOTICE OF APPEAL
Case No. 561-943

Defendants,
ELMER F. GERAGHTY, CLAIRE C. GERAGHTY and EVALYN LEONARD,
Defendants,

and

FRANKLIN STONE PRODUCTS, INC.,
Defendant and
Third-Party Plaintiff,

vs.

LANNON STONE PRODUCTS CORP. and
RITA KLUTH,
Third-Party Defendants.

TO: Gary J. Barczak
Milwaukee County
Clerk of Courts
Courthouse
901 North 9th Street
Milwaukee, Wisconsin 53233

Niebler and Niebler
Attorneys for J. Dale Dawson,
Margaret Osmundsen, and
Lannon Stone Products, Inc.
N95 W16975 Highway 41
P. O. Box 444
Menomonee Falls,
Wisconsin 53051

Leonard W. Schulz
Attorney for Defendant
Franklin Stone Products, Inc.
P. O. Box 156
Big Bend, Wisconsin 53103

Hunter & Sommers
Attorneys for Rita Kluth
253 South Street
Waukesha, Wisconsin 53186

PLEASE TAKE NOTICE that the defendants, Elmer F. Geraghty, Claire C. Geraghty and Evalyn Leonard, hereby appeals to the Wisconsin Court of Appeals, District #1, from the orders entered on March 8, 1983 and March 23, 1983 in the Circuit Court in and for Milwaukee County, Wisconsin, the Honorable Patrick J. Madden, Circuit Judge, presiding, Case #561-943, in favor of the plaintiff, J. Dale Dawson and Margaret Osmundsen, and against the defendants Elmer F. Geraghty, Claire C. Geraghty and Evalyn Leonard, wherein the order of March 8, 1983 denied the defendants motion to set aside the purported Stipulation and Order dated January 10, 1983, and the written order entered January 17, 1983, made effective *nunc pro tunc* as of January 10, 1983, and granted, with modifications, the plaintiff's motion to enforce the order of the court made effective *nunc pro tunc* as of January 10, 1983, and wherein the order of March 23, 1983 denied the motion of defendant, Franklin Stone Products, Inc., to set aside the purported Stipulation and Order dated January 10, 1983, and the written order entered January 17, 1983 made effective *nunc pro tunc* as of January 10, 1983, and the order appointing Receiver pursuant to the Court's decision made at the hearing on March 21, 1983. That further, said order denied the defendant's motion for a stay of all proceedings pending appeal.

That copies of each of said orders are attached hereto and incorporated herein by reference.

That this is not an appeal within Sec. 752.31(2) of the Wisconsin Statutes.

Dated this 28th day of March, 1983.

KERSHEK & KERSHEK

/s/ Eugene A. Kershek

By: Eugene A. Kershek
Attorney for Elmer F. Geraghty, Claire C. Geraghty and Evalyn Leonard

P. O. ADDRESS:

10701 West National Avenue
Milwaukee, Wisconsin 53227
(414) 321-6530

cc: Clerk of the Wisconsin Court of Appeals
State Capitol Building
Madison, Wisconsin 53702

STATE OF WISCONSIN
CIRCUIT COURT MILWAUKEE COUNTY

J. DALE DAWSON and
MARGARET OSMUNDSEN,
Plaintiffs,

AMENDED

NOTICE OF APPEAL
Case No. 561-943

vs.

ELMER F. GERAGHTY, CLAIRE C. GERAGHTY and EVALYN LEONARD,
Defendants.

vs.

FEANKLIN STONE PRODUCTS, INC.,
Defendant and
Third-Party Plaintiff,

vs.

LANNON STONE PRODUCTS CORP. and
RITA KLUTH,
Third-Party Defendants.

TO: GARY J. BARCZAK
Milwaukee County
Clerk of Courts
Courthouse
901 North 9th Street
Milwaukee, Wisconsin 53233

NIEBLER and NIEBLER
Attorneys for J. Dale Dawson,
Margaret Osmundsen, and
Lannon Stone Products, Inc.
N95 W16975 Highway 41
P. O. Box 444
Menomonee Falls,
Wisconsin 53051

LEONARD W. SCHULZ
Attorney for Defendant
Franklin Stone Products, Inc.
P. O. Box 156
Big Bend, Wisconsin 53103

HUNTERS & SOMMERS
Attorneys for Rita Kuth
253 South Street
Waukesha, Wisconsin 53186

NOTICE IS HEREBY GIVEN that the defendants, Elmer F. Geraghty and Claire C. Geraghty and Evalyn Leonard, hereby applies to the Court of Appeals District No. 1 from an order entered on March 30, 1983 in the Circuit Court in and for Milwaukee County, Wisconsin, the Honorable Patrick J. Madden, Circuit Judge presiding, Case No. 561-943, in favor of plaintiffs, J. Dale Dawson and Margaret Osmundsen, and against the defendants, Elmer F. Geraghty, Claire C. Geraghty and Evalyn Leonard and Franklin Stone Products, Inc., wherein the court in said order appointed a receiver to affect the sale and liquidation of the corporate assets of Franklin Stone Products, Inc., of which the appellants are shareholders, officers, and directors of said corporation; the order further granting broad and sweeping powers and authority to the receiver to "liquidate the corporation and wind up its affairs as provided in Section 180.771 through 180.787 of the Wisconsin Statutes without specific application of the court for the particular acts required to accomplish said liquidation". A copy of said order is attached hereto and incorporated herein by reference.

This AMENDED NOTICE OF APPEAL adds the order of March 30, 1983 to the orders previously appealed.

This is NOT an Appeal within Section 752.32(2) of the Wisconsin Statutes.

Dated at Milwaukee, Wisconsin, this 5th day of April, 1983.

KERSHEK & KERSHEK

/s/ Eugene A. Kershek

Eugene A. Kershek,
Attorney for Elmer Geraghty,
Claire Geraghty and
Evalyn Leonard

P. O. ADDRESS:
10701 West National AVenue
Milwaukee, Wisconsin 53227
321-6530

cc: CLERK OF COURT OF APPEALS
State Capitol Building
Madison, Wisconsin 53702

APPENDIX F

STATE OF WISCONSIN
CIRCUIT COURT MILWAUKEE COUNTY

NOTICE OF APPEAL

Case No. 561-943

J. DALE DAWSON and
MARGARET OSMUNDSEN,
Plaintiffs,

-vs-

ELMER F. GERAGHTY, CLAIRE C. GERAGHTY and EVALYN LEONARD,
Defendants,

and

FRANKLIN STONE PRODUCTS, INC.,
Defendant and
Third-Party Plaintiff,

-vs-

LANNON STONE PRODUCTS CORP. and
RITA KLUTH,
Third-Party Defendants.

TO: *Gary J. Barczak*
Milwaukee County
Clerk of Courts
Courthouse
901 N. 9th Street
Milwaukee, Wisconsin 53233

Mr. Eugene A. Kershek
Attorney for Elmer J. Geraghty,
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Evalyn Leonard
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Niebler and Niebler
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Margaret Osmundsen, and
Lannon Stone Products, Inc.
N95 W16975 Highway 41
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Menomonee Falls,
Wisconsin 53051

Hunter & Sommers
Attorneys for Rita Kluth
253 South Street
Waukesha, Wisconsin 53186

NOTICE IS HEREBY GIVEN that the defendant, Franklin Stone Products, Inc., a Wisconsin corporation, appeals to the Court of Appeals, District I, from orders entered on March 8, 1983, and March 23, 1983, in the Circuit Court for Milwaukee County, Wisconsin, the Honorable Patrick J. Madden, Circuit Judge, presiding, Case No. 561-943, in favor of the plaintiffs, J. Dale Dawson and Margaret Osmundsen, and against the defendant, Franklin Stone Products, Inc., wherein the Court in the said orders denied the motions of the defendant, Franklin Stone Products, Inc., to set aside the stipulation and order dated January 10, 1983, and the written order entered January 17, 1983, made effective *nunc pro tunc* as of January 10, 1983, and granted, with modifications, the plaintiffs' motion to enforce the order of the Court made effective *nunc pro tunc* as of January 10, 1983, and wherein the Court in the said orders denied the defendant, Franklin Stone Products, Inc.'s, motion to vacate prior orders of the Court dated January 17, 1983, made effective *nunc pro tunc* as of January 10, 1983, and the order of March 8, 1983, to set aside the oral stipulation spread on the record on January 10, 1983, and to stay all proceedings pending appeal. A copy of each of said orders is appended hereto. This is not an appeal within Sec. 752.31(2), Stats.

Dated this 24th day of March, 1983.

/s/ Leonard W. Schulz

Leonard W. Schulz
Attorney for Defendant,
Franklin Stone Products, Inc.
P. O. Box 156
Big Bend, Wisconsin 53103
Telephone: (414) 662-3100

STATE OF WISCONSIN
CIRCUIT COURT MILWAUKEE COUNTY

AMENDED
NOTICE OF APPEAL

Case No. 561-943

J. DALE DAWSON and
MARGARET OSMUNDSEN,
Plaintiffs,

-vs-

ELMER F. GERAGHTY, CLAIRE C.
GERAGHTY and EVALYN LEONARD,
Defendants,

and

FRANKLIN STONE PRODUCTS, INC.,
Defendant and
Third-Party Plaintiff,

-vs-

LANNON STONE PRODUCTS CORP. and
RITA KLUTH,
Third-Party Defendants.

TO: *Gary J. Barczak*
Milwaukee County
Clerk of Courts
Courthouse
901 N. 9th Street
Milwaukee, Wisconsin 53233

Mr. Eugene A. Kershek
Attorney for Elmer J. Geraghty,
Claire C. Geraghty and
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N95 W16975 Highway 41
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Menomonee Falls,
Wisconsin 53051

Hunter & Sommers
Attorneys for Rita Kluth
253 South Street
Waukesha, Wisconsin 53186

NOTICE IS HEREBY GIVEN that the defendant, Franklin Stone Products, Inc., a Wisconsin corporation, appeals to the Court of Appeals, District I, from an order entered on March 30, 1983, in the Circuit Court for Milwaukee County, W. asin, the Honorable Patrick J. Madden, Circuit Judge, presiding, Case No. 561-943, in favor of the plaintiffs, J. Dale Dawson and Margaret Osmundsen, and against the defendant, Franklin Stone Products, Inc., wherein the Court in said order appointed a receiver to effect the sale and liquidation of corporate assets owned by the defendant, Franklin Stone Products, Inc., and to manage and conduct the litigation in Case No. 561-943 and in any other cases on behalf of the defendant, Franklin Stone Products, Inc. A copy of said order is appended hereto. This is not an appeal within Sec. 752.31(2), Stats. This amended Notice of Appeal adds the order of March 30, 1983, to the orders previously appealed.

Dated this 30th day of Mrach, 1983.

/s/ Leonard W. Schulz

Leonard W. Schulz
Attorney for Defendant,
Franklin Stone Products, Inc.

P. O. Box 156
Big Bend, Wisconsin 53103

Telephone: (414) 662-3100

Copy: Clerk of Court of Appeals
State Capitol Building
Madison
Wisconsin 53702